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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ULTIMATE BRAND
MANAGEMENT, LLC,

Plaintiff,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. 2:15-CV-10001-BRO-AJW

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
EVIDENTIARY AND ADVERSE
INFERENCE SANCTIONS
PURSUANT TO THE COURT'S
INHERENT AUTHORITY FOR
DEFENDANT'S WILLFUL
SPOILIATION OF EVIDENCE**

[Declaration of Jon A. Weininger
filed and [Proposed] Order lodged
concurrently]

Date: August 7, 2017
Time: 1:30 p.m.
Place: Courtroom 7C
350 W. 1st Street
Los Angeles, 90012
Judge: Hon. Beverly Reid
O'Connell

Disc. Cutoff: July 31, 2017
PTC: September 11, 2017
Trial: October 10, 2017

**REDACTED VERSION OF DOCUMENT
PROPOSED TO BE FILED UNDER SEAL**

TO DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on Monday, August 7, 2017, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 7C at the First Street Federal Courthouse, 350 W. 1st Street, Los Angeles, CA 90012, before the Honorable Beverly Reid O’Connell, United States District Court Judge, Plaintiff Ultimate Brand Management, LLC (“UBM”) will and hereby does move this Court for an order assessing evidentiary and/or adverse inference sanctions against Defendant Wal-Mart Stores, Inc. (“Walmart”) for its willful spoliation of evidence in this case.

This Motion is made pursuant to the Court’s inherent authority to impose sanctions for a party’s spoliation of evidence and is based on Walmart’s destruction of evidence demonstrating its unlawful use of UBM’s “MMA ELITE” trademark to sell non-MMA ELITE apparel in its stores.

This Lanham Act and common law unfair competition case centers on Walmart’s unauthorized use of signs bearing UBM’s MMA ELITE trademark to sell non-licensed apparel that Walmart intentionally caused to look virtually indistinguishable from licensed MMA ELITE apparel that Walmart previously sold. UBM sued Walmart after it learned that Walmart continued to display MMA ELITE signs in its stores after it stopped selling licensed MMA ELITE apparel, but while continuing to sell the lookalike apparel. Walmart was on notice that its use of MMA ELITE signs in its stores, and the manner in which it displayed the lookalike apparel in proximity to those signs, was a central disputed issue in this case as of January 4, 2016, when UBM served Walmart with its Complaint.

At that time, Walmart had an affirmative obligation to preserve all evidence that it knew or reasonably should have known might be potentially relevant. Walmart breached this duty by destroying evidence of its actual use of MMA ELITE signs in its stores. Specifically, after initially denying

1 that any MMA ELITE signs were up in its stores, Walmart later realized

2 [REDACTED]
3 [REDACTED] But rather
4 than preserve its actual use and display of those signs and surrounding
5 apparel in its stores, as it was obligated to do, Walmart [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 As a result of Walmart's spoliation of this evidence, UBM's ability to
9 prosecute its case has been severely and irreparably prejudiced. Walmart
10 has destroyed the only remaining direct evidence that would illustrate how it
11 was actually using the signs in its stores as late as 2016 and 2017.

12 Accordingly, UBM requests that the Court assess sanctions against
13 Walmart for its willful spoliation of evidence. The requested sanctions are
14 intended to be tailored to the prejudice inflicted upon UBM by Walmart's
15 violation of its preservation obligations and to prevent Walmart from
16 reaping any evidentiary rewards associated with its spoliation.

17 In particular, UBM asks the Court to assess the following sanctions:

18 1. Walmart's use of MMA ELITE signs in 2016 and 2017 should be
19 deemed to constitute willful infringement of UBM's MMA ELITE trademark,
20 and Walmart should be prevented from presenting any evidence, testimony,
21 or argument that its use of MMA ELITE signs in 2016 and 2017 was not
22 willful infringement of UBM's MMA ELITE trademark; and

23 2. Walmart should be prevented from presenting evidence,
24 testimony, or argument regarding when, where, or how it used or displayed
25 MMA ELITE signs, or when, where, or how it used or displayed any non-
26 licensed apparel similar in appearance and style to MMA ELITE branded
27 apparel that was sold in its stores in 2016 and 2017.

28

1 In addition, UBM requests that the Court impose adverse inference
2 sanctions by giving the following instructions to the jury at the time of trial:

3 1. “Walmart had a legal obligation to preserve all relevant evidence
4 after being served with the Complaint. Walmart violated this obligation by
5 intentionally destroying evidence that would have showed how Walmart was
6 using MMA ELITE signs in its stores to sell similar looking non-MMA ELITE
7 apparel. You may infer from Walmart’s destruction of this evidence that
8 Walmart intentionally used MMA ELITE signs to attract customers to
9 Walmart’s similar looking non-MMA ELITE apparel.”

10 2. “Walmart had a legal obligation to preserve all relevant evidence
11 after being served with the Complaint. Walmart violated this obligation by
12 intentionally destroying evidence that would have showed how Walmart was
13 using MMA ELITE signs in its stores to sell similar looking non-MMA ELITE
14 apparel. You may infer from Walmart’s conduct that the evidence destroyed
15 would have been favorable to UBM’s case and harmful to Walmart’s case.”

16 Pursuant to Local Rule 7-3, counsel for UBM and Walmart met and
17 conferred, and discussed the substance of this Motion. [See Declaration of
18 Jon A. Weininger (“Weininger Decl.”), ¶ 19.]

19 This Motion is based on this Notice of Motion and Motion, the
20 appended Memorandum of Points and Authorities, the concurrently filed
21 Weininger Decl. and exhibits thereto, any reply submission that UBM may
22 file, all matters of which the Court may take judicial notice, the pleadings
23 and papers on file in this action, and any further oral or written evidence
24 that the Court may consider before or at any hearing on this Motion.

25 DATED: July 5, 2017 JEFFER MANGELS BUTLER & MITCHELL LLP

26 /s/ Jon A. Weininger

27 JON A. WEININGER
28 Attorneys for Plaintiff ULTIMATE BRAND
MANAGEMENT, LLC

TABLE OF CONTENTS**Page**

I.	INTRODUCTION	10
II.	FACTS.....	12
A.	UBM's MMA ELITE Trademark	12
B.	MMA ELITE Was Sold Exclusively at Walmart and Became Very Popular with Walmart's Customers.....	13
C.	Walmart's Scheme to Divert Customers From MMA ELITE Apparel to Its Own Private Label Products.....	13
D.	The MMA ELITE Signs	14
E.	In December 2015, UBM Filed This Lawsuit	15
F.	[REDACTED]	15
G.	In February 2017, Walmart Informed UBM For the First Time That It Had [REDACTED]	17
H.	Walmart Ignored UBM's Attempts to Address This Issue	17
I.	Walmart Refused to Permit Questioning Regarding the Reasons [REDACTED]	18
J.	Counsels' Meet and Confer	18
III.	THE COURT HAS THE INHERENT AUTHORITY TO IMPOSE SANCTIONS FOR A PARTY'S SPOILIATION OF EVIDENCE	18
IV.	WALMART COMMITTED WILLFUL SPOILIATION.....	19
A.	Walmart Was Obligated to Preserve Evidence Relating to Its Use of MMA ELITE Signs in Its Stores.....	20
B.	Walmart's Use of MMA ELITE Signs in the Marketplace That It Created is Critically Relevant to This Case.....	21
C.	Walmart Willfully Destroyed Relevant Evidence.....	23
1.	Walmart's Actions Constitute Willful Spoliation.....	23

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2
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2.	Walmart Also Failed to Inform UBM That [REDACTED] [REDACTED]	24
3.	Walmart’s History of Spoliation In Other Cases Confirms That It Did Not Act Innocently Here	26
D.	Walmart’s Spoliation Severely Prejudices UBM	27
V.	EVIDENTIARY AND ADVERSE INFERENCE SANCTIONS ARE NECESSARY TO LEVEL THE PLAYING FIELD	28
A.	Evidentiary Sanctions are Necessary	28
B.	Adverse Inference Sanctions Also Are Necessary	31
VI.	CONCLUSION	33

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TABLE OF AUTHORITIES**Page(s)****CASES**

<i>Abdulahi v. Wal-Mart Stores East, L.P.</i> , 76 F.Supp.3d 1393 (N.D. Ga. 2014)	26
<i>Aktas v. JMC Devel. Co., Inc.</i> , 877 F.Supp.2d 1 (N.D.N.Y. 2012)	24, 31, 32
<i>Apple Inc. v. Samsung Electronics Co., Ltd.</i> , 881 F.Supp.2d 1132 (N.D. Cal. 2012)	20
<i>Britton v. Wal-Mart Stores East, L.P.</i> , No. 4:11cv32-RH/WCS, 2011 WL 3236189 (N.D. Fla. June 8, 2011)	26
<i>Columbia Pictures, Inc. v. Bunnell</i> , No. 2:06-cv-01093 FMC-JCx, 2007 WL 4877701 (C.D. Cal. Dec. 13, 2007)	19, 21, 30
<i>Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.</i> , 101 F.Supp.3d 856 (C.D. Cal. 2015)	19
<i>Crown Battery Mfg. Co. v. Club Car, Inc.</i> , 185 F.Supp.3d 987 (N.D. Ohio 2016)	24
<i>Empire, Inc. v. Wal-Mart Stores, Inc.</i> , 188 F.R.D. 478 (E.D. Ky. 1999)	27
<i>First Sr. Fin. Grp. LLC v. Watchdog</i> , No. 12-cv-1247, 2014 WL 1327584 (E.D. Pa. Apr. 3, 2014)	24, 25
<i>Gaffield v. Wal-Mart Stores East, LP</i> , 616 F.Supp.2d 329 (N.D.N.Y. 2009)	26
<i>Garcia v. City of Santa Clara</i> , No. 10-cv-02424-SI, 2017 WL 1398263 (N.D. Cal. Apr. 19, 2017)	23, 24
<i>Glover v. Bic Corp.</i> , 6 F.3d 1318 (9th Cir. 1993)	31
<i>Greenwalt v. Wal-Mart Stores, Inc.</i> , 253 Neb. 32, 567 N.W.2d 560 (Neb. 1997)	27

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2	No. 98 CIV. 7724 RPP, 2000 WL 335558	
3	(S.D.N.Y. Mar. 30, 2000).....	26
4	<i>In re Napster Copyright Litig.</i> ,	
5	462 F.Supp.2d 1060 (N.D. Cal. 2006)	29, 31
6	<i>Leon v. IDX Sys. Corp.</i> ,	
7	464 F.3d 951 (9th Cir. 2006).....	19, 23, 24
8	<i>McDonald v. Wal-Mart Stores East, LP</i> ,	
9	No. 3:07cv425, 2008 WL 153783 (E.D. Va. Jan. 14, 2008)	26
10	<i>Patton v. Wal-Mart Stores, Inc.</i> ,	
11	No. 2:12-cv-02142-GMN-VCF, 2013 WL 6158467	
12	(D. Nev. Nov. 20, 2013).....	26
13	<i>Perez v. Shippers Transport Express, Inc.</i> ,	
14	CV 13-4255 BRO (PLAx), 2014 WL 12591809	
15	(C.D. Cal. July 8, 2014)	passim
16	<i>Reed v. KinderCare Learning Centers</i> ,	
17	No. C15-5634BHS, 2016 WL 6805336	
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19	<i>Sanchez v. Rodriguez</i> ,	
20	298 F.R.D. 460 (C.D. Cal. 2014)	23, 24
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28	(D. Nev. June 24, 2016)	26, 28, 29
	<i>Wagner v. Sea Esta Motel I</i> ,	
	No. 13-81-RGA, 2014 WL 4247731 (D. Del. Aug. 26, 2014).....	32
	<i>Wilson v. Wal-Mart Stores, Inc.</i> ,	
	199 F.R.D. 207 (S.D. Tex. 2001).....	26

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

This is a trademark infringement and unfair competition case concerning UBM's registered trademark "MMA ELITE." The crux of this case is Walmart's unauthorized use of large, wall-mounted signs featuring the MMA ELITE mark to lure consumers to Walmart's private label and generic apparel that was intentionally designed to look like licensed MMA ELITE apparel that Walmart had previously sold in its stores. UBM brings this Motion because Walmart destroyed evidence of its actual continuing use of those signs in its stores for nearly one year after the Complaint was filed.

Before this dispute arose, UBM licensed third-party manufacturers to supply Walmart with apparel products sold under the MMA ELITE brand. These products were geared toward fans of mixed martial arts fighting events, including fights sponsored by the Ultimate Fighting Championship ("UFC"), and others interested in the ultimate fighting lifestyle. Due to UBM's efforts to develop and promote the MMA ELITE brand, UBM and Walmart enjoyed several years of robust sales that in the aggregate exceeded well over one hundred million dollars of MMA ELITE products at retail.

Walmart, however, is a cutthroat retailer that is always looking to lower retail prices while maintaining margins. Sensing an opportunity to capitalize on the success of the MMA ELITE brand and goodwill that UBM developed with the Walmart customer, Walmart decided to re-introduce its own private label and generic lines of apparel that featured graphics similar to MMA ELITE apparel. Walmart's plan was to replace MMA ELITE entirely on its floors with its own lines of similar product, but not immediately. Instead, Walmart slowly introduced its lookalike products – offered at lower retail prices – next to MMA ELITE products. Only after Walmart began to phase out specific categories of MMA ELITE products on its floors, in favor

1 of its lookalike products, did Walmart decide to start displaying the large,
 2 wall-mounted MMA ELITE signs at issue in its stores across the country.
 3 Walmart kept those signs up its stores until as recently as January 2017,
 4 years after it had stopped ordering any new MMA ELITE products.

5 In its Complaint filed in December 2015, UBM alleged that Walmart
 6 misused MMA ELITE signs as part of a scheme to willfully trade off the
 7 goodwill of MMA ELITE to sell tens of millions of dollars of Walmart's
 8 private label and generic apparel. UBM also alleged that, as of the date of
 9 the Complaint, Walmart continued to misuse MMA ELITE signs to sell its
 10 lookalike apparel. In its Answer, Walmart denied that it continued to use or
 11 display any MMA ELITE signs in its stores.

12 Unbeknownst to UBM, Walmart's denial turned out to be false. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 [REDACTED] Far from complying with its preservation
 23 obligations, Walmart destroyed the only remaining evidence that would
 24 demonstrate how it was actually using MMA ELITE signs in commerce.

25 The evidence that Walmart failed to preserve was the most direct
 26 evidence of this important aspect of UBM's claims. Walmart understood this
 27 fact, yet took no steps to preserve the evidence. Walmart did not even alert
 28

1 UBM to the fact that signs were still up in its stores. Walmart's failures
2 amount to willful spoliation.

3 Walmart cannot claim ignorance of its affirmative duty to preserve
4 relevant evidence or profess innocence. For at least two decades, courts
5 across the country have sanctioned Walmart for destroying relevant
6 evidence. *See infra*, Part IV.C.3. Walmart's conduct here is simply the latest
7 chapter in a well-established pattern of spoliation, which makes the
8 imposition of meaningful evidentiary sanctions appropriate.

9 Meaningful sanctions also are necessary because Walmart's willful
10 spoliation has severely prejudiced UBM's ability to prosecute its case.
11 Walmart has robbed UBM of the most direct evidence of Walmart's actual
12 use of MMA ELITE signs. The Court should grant this Motion assess the
13 requested evidentiary and adverse inference sanctions against Walmart to
14 remediate that prejudice.

15 16 **II. FACTS**

17 **A. UBM's MMA ELITE Trademark**

18 UBM owns the federally registered trademark "MMA ELITE" and
19 other common law intellectual property rights. [*See Docket No. 1 at ¶3.*]
20 From 2009 until its business was destroyed by the unlawful acts of Walmart
21 alleged herein, UBM sold and licensed others to sell apparel and associated
22 products under the MMA ELITE mark geared toward fans of mixed martial
23 arts and others interested in the ultimate fighting lifestyle. [*See id. at ¶7.*]

24 UBM spent substantial time and money creating the MMA ELITE
25 brand and developing consumer goodwill in its branded apparel and
26 products. [*See id. at ¶8.*] UBM also spent substantial resources marketing
27 and advertising the MMA ELITE brand. Among other things, UBM became
28 an official partner of the UFC, displayed the MMA ELITE mark in the

1 “Octagon” on televised UFC events, and affixed licensed UFC stickers on
2 much of its apparel sold at Walmart. [[See id.](#)] UBM also sponsored
3 numerous fighters and athletes who wore MMA ELITE branded clothing and
4 equipment at public events, and sponsored gyms featuring mixed martial
5 arts and/or ultimate fighting training and related programs. [[See id.](#)]

6 **B. MMA ELITE Was Sold Exclusively at Walmart and**
7 **Became Very Popular with Walmart’s Customers**

8 The MMA ELITE brand became so well-known that Walmart selected
9 MMA ELITE as its exclusive source of branded mixed-martial arts/ultimate
10 fighting lifestyle themed apparel to sell in its stores. [[Id. at ¶ 10.](#)]

11 MMA ELITE apparel was popular with Walmart’s customers. Between
12 2009 and mid-2013, Walmart sold millions of units of MMA ELITE apparel
13 generating retail sales exceeding one hundred million dollars. [[See id. at ¶](#)
14 [11.](#)] Those revenues produced millions of dollars in royalty income to UBM.

15 **C. Walmart’s Scheme to Divert Customers From MMA**
16 **ELITE Apparel to Its Own Private Label Products**

17 Despite the success of MMA ELITE, Walmart thirsted for ever greater
18 profits. Recognizing that MMA ELITE royalties prevented reductions in
19 retail prices without impacting margins, Walmart decided to replace MMA
20 ELITE with similar-looking apparel sold under Walmart’s own private label
21 and/or as generic products with no label (collectively, the “Walmart
22 Apparel”). [[Id.](#)]

23 Moreover, to satisfy its customers’ established preference for MMA
24 ELITE products, Walmart intentionally selected the same manufacturer that
25 designed and supplied the MMA ELITE apparel. This allowed Walmart to
26 offer its Walmart Apparel with designs and styles virtually indistinguishable
27 from MMA ELITE, but at a steep reduction in price. [[Id. at ¶ 14.](#)]

28

1 Walmart's plan was to entirely replace MMA ELITE with Walmart
2 Apparel, but not immediately. [*Id.* at ¶¶ 11-15.] Instead, Walmart slowly
3 introduced its lookalike Walmart Apparel next to MMA ELITE products in
4 order to use the goodwill of MMA ELITE to entice customers to the Walmart
5 Apparel. [*See id.* at ¶ 14.]

6 **D. The MMA ELITE Signs**

7 In July 2012, months after Walmart decided to replace certain MMA
8 ELITE products with similar Walmart Apparel, and when the future of the
9 MMA ELITE brand at Walmart was in serious doubt internally, Walmart
10 decided to start displaying large (3' x 3') signs bearing the MMA ELITE
11 trademark on the "back wall" above the tee shirts displayed in its men's
12 department. [Declaration of Jon A. Weininger ("Weininger Decl."), Ex. 3
13 (Excerpts of the Transcript of the Deposition of David Hopper, taken May 5,
14 2017 ("Hopper Tr.")) at 152:3-157:19; Ex. 14.¹] The signs were displayed high
15 up on the wall, making them visible to Walmart's customers from afar. [*See*
16 Exs. 12-13; Ex. 3 (Hopper Tr.) at 40:14-41:16, 48:16-24.]

17 [REDACTED]
18 [REDACTED] [Ex. 6.] However, Walmart continued to use the MMA ELITE
19 signs. [*Docket No. 1* at ¶ 16; *see infra* at Part II.F.] In 2014, after UBM
20 became aware of this fact, it told Walmart to remove all of the signs from its
21 stores. [Ex. 5 (Excerpts of the Transcript of the Deposition of Alden
22 Halpern, taken Feb. 27, 2017 ("Halpern Tr.")) at 156:7-159:25.] Walmart
23 ignored the request. [*See id.*]

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28 ¹ All references to Exhibits ("Ex. __") are to exhibits to the Weininger Decl.

E. In December 2015, UBM Filed This Lawsuit

On December 30, 2015, UBM filed its Complaint in this action. [Docket No. 1.] Walmart was served on January 4, 2016. [Docket No. 8.] Walmart filed its Answer on February 24, 2016. [Docket No. 16.]

The core of UBM's case is its allegation that Walmart misused signs bearing UBM's MMA ELITE mark in its stores to attract customers to, and sell, the Walmart Apparel.

In particular, UBM alleges that Walmart lured customers to Walmart Apparel by displaying signs bearing the MMA ELITE mark above and near the Walmart Apparel. [See Docket No. 1 at ¶¶ 13-20.] UBM alleges that Walmart misused MMA ELITE signs in this fashion during the time (a) that Walmart sold both MMA ELITE branded apparel and Walmart Apparel (*id.* at ¶ 14), and (b) after Walmart stopped purchasing MMA ELITE apparel and sold only Walmart Apparel (*id.* at ¶ 16).

In its Answer, Walmart denied UBM's allegations that Walmart was continuing to display MMA ELITE signs in its stores. [See Docket No. 16 at p. 3 (denying ¶ 16).] Because Walmart denied this allegation, UBM had no reason to suspect that Walmart might still be using the signs.

F.

[Redacted] [See Ex. 1 (Excerpts from the Transcript of the Deposition of Robert Jay Howell, taken May 2, 2017 ("Howell Tr.")), at 22:14-21, 24:11-25:10.]

[Redacted] [*Id.*

1 at 26:24-27:12, 52:14-53:11; Ex. 2 (Excerpts from the Transcript of the
2 Deposition of Lindsey Blakely, taken May 2, 2017 (“Blakely Tr.”)), at 13:25-
3 14:2; Ex. 9.]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] [See Ex. 9; Ex. 1
9 (Howell Tr.) at 51:8-14.] [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] [Ex. 9 (emphasis added).]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] [Ex. 2 (Blakely Tr.) at 72:21-73:9; Ex. 9.]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] [Ex. 2 (Blakely Tr.) at 22:10-
21 24:1, 42:6-14, 80:23-81:2, 87:17-21; Ex. 10.] [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] [Ex. 10.]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] [Ex. 2 (Blakely Tr.) at 52:13-25, 55:21-56:7, 61:2-9, 63:11-
28 64:24, 96:19-3; Ex. 11.]

1 [REDACTED] [Ex. 2
2 (Blakely Tr.) at 65:23-66:19.] [REDACTED]

3 [REDACTED] [Ex. 8.] [REDACTED]

4 [REDACTED]

5 [REDACTED] [*Id.*]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] [See Ex. 1 (Howell Tr.) at 51:15-24; Ex. 2 (Blakely Tr.) at 77:5-25.]

9 **G. In February 2017, Walmart Informed UBM For the First**
10 **Time That It Had** [REDACTED]

11 On or about February 3, 2017, Walmart produced documents to UBM.
12 [Weininger Decl., ¶ 17.] Among those documents were [REDACTED]

13 [REDACTED]

14 [REDACTED] [*Id.*]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED] [*Id.*]

18 **H. Walmart Ignored UBM's Attempts to Address This Issue**

19 On April 21, 2017, UBM's counsel wrote a letter to Walmart's counsel
20 that stated, in part: "If Walmart removed MMA ELITE signs from its stores
21 after this litigation was filed, without providing us advance notice and/or
22 documenting where and how those signs were used or displayed in its stores,
23 please let us know, as that would raise a different issue that we would
24 address separately." [Weininger Decl., ¶ 18, Ex. 16.]

25 Walmart's counsel did not respond to that letter. [*Id.*]

26

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28

1 **I. Walmart Refused to Permit Questioning Regarding** [REDACTED]

2 [REDACTED]

3 In May 2017, Walmart produced two Rule 30(b)(6) witnesses

4 ostensibly to answer questions regarding [REDACTED]

5 [REDACTED] [Ex. 1 at 11:17-14:1; Ex. 2 at 11:4-24.] However, [REDACTED]

6 [REDACTED]

7 [REDACTED]. [See,

8 e.g., Ex. 1 at 24:16-21, 32:21-33:5, 39:22-40:6; Ex. 2 at 82:4-14.]

9 **J. Counsel Timely Met and Conferred**

10 On June 9, 2017, pursuant to Local Rule 7-3, counsel for UBM and

11 Walmart met and conferred to thoroughly discuss the substance of the

12 Motion in an attempt to reach resolution. [Weininger Decl., ¶ 19.] The

13 parties were unable to resolve any of the issues raised in this Motion. [*Id.*]

14

15 **III. THE COURT HAS THE INHERENT AUTHORITY TO IMPOSE**

16 **SANCTIONS FOR A PARTY'S SPOILIATION OF EVIDENCE**

17 "Spoliation of evidence is the 'destruction or significant alteration of

18 evidence, or the failure to preserve property for another's use as evidence, in

19 pending or future litigation.'" [*Reed v. KinderCare Learning Centers, No.*](#)

20 [C15-5634BHS, 2016 WL 6805336, *2 \(W.D. Wash. Nov. 17, 2016\)](#), *quoting*

21 [Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 649 \(9th Cir. 2009\)](#).

22 "When a party fails to meet its duty to preserve evidence, the opposing party

23 may move the court to sanction that party for destroying evidence." [*Perez v.*](#)

1 *Shippers Transport Express, Inc.*, CV 13-4255 BRO (PLAx), 2014 WL
 2 12591809, *3 (C.D. Cal. July 8, 2014).²

3 “[A] district court can sanction a party who has despoiled evidence”
 4 under “the inherent power of federal courts to levy sanctions in response to
 5 abusive litigation practices.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th
 6 Cir. 2006). “The court’s inherent authority to impose sanctions for the
 7 wrongful destruction of evidence includes the power to exclude evidence
 8 that, given the spoliation, would ‘unfairly prejudice an opposing party.’”
 9 *Perez*, 2014 WL 12591809, at *9, quoting *In re Napster Copyright Litig.*,
 10 462 F.Supp.2d 1060, 1077 (N.D. Cal. 2006).

11 In particular, “[a] court may sanction spoliation by: imposing
 12 monetary sanctions; instructing the jury to draw an adverse inference
 13 against the despoiling party; excluding testimony based on despoiled
 14 evidence proffered by the despoiling party; or, if willfulness is found,
 15 entering default judgment against the despoiling party.” *Consumer Fin.*
 16 *Prot. Bureau v. Morgan Drexen, Inc.*, 101 F.Supp.3d 856, 868 (C.D. Cal.
 17 2015), quoting *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093 FMC-
 18 JCx, 2007 WL 4877701, *4 (C.D. Cal. Dec. 13, 2007).

19 As demonstrated below, Walmart has committed willful spoliation of
 20 relevant evidence to UBM’s prejudice, and, accordingly, evidentiary and
 21 adverse inference sanctions are appropriate.

23 **IV. WALMART COMMITTED WILLFUL SPOLIATION**

24 “Courts typically apply the following test to determine whether to
 25 impose sanctions for spoliation, requiring the party seeking sanctions to

26 ² Because this Motion involves a request that the Court exercise its inherent
 27 authority in response to Walmart’s spoliation of relevant evidence, “Rules
 28 37-1 and 37-2 do not apply.” *Perez*, 2014 WL 12591809, at *8.

1 establish: (1) that the party having control over the evidence had an
 2 obligation to preserve it at the time it was destroyed; (2) that the records
 3 were destroyed with a ‘culpable state of mind’ and (3) that the evidence was
 4 ‘relevant’ to the party’s claim or defense such that a reasonable trier of fact
 5 could find that it would support that claim or defense.” [*Star Envirotech, Inc.*](#)
 6 [*v. Redline Detection, LLC*, No. SA CV 12-01861-JGB \(DFMx\), 2015 WL](#)
 7 [9093561, *5 \(C.D. Cal. Dec. 16, 2015\)](#). All three factors are established here.

8 **A. Walmart Was Obligated to Preserve Evidence Relating**
 9 **to Its Use of MMA ELITE Signs in Its Stores**

10 “[A]s soon as a potential claim is identified, a litigant is under a duty to
 11 preserve evidence which it knows or reasonably should know is relevant to
 12 the action.” [*Perez*, 2014 WL 12591809, at *4, quoting *Napster*, 462](#)
 13 [F.Supp.2d at 1067](#). This obligation requires a company to not only instruct
 14 its employees to preserve evidence, but also to “verify whether its employees
 15 were actually complying” with those instructions. [*Apple Inc. v. Samsung*](#)
 16 [*Electronics Co., Ltd.*, 881 F.Supp.2d 1132, 1147 \(N.D. Cal. 2012\)](#).

17 The [*Reed*](#) case is instructive. There, the plaintiff alleged claims for,
 18 among other things, disability discrimination and failure to accommodate
 19 relating to the defendant’s facility where she worked. [2016 WL 6805336, at](#)
 20 [*1-2](#). The plaintiff notified defendant that she wanted to inspect the facility.
 21 [Id. at *2](#). The defendant objected to that request and, two days later, “closed
 22 the [facility] without notice to [the plaintiff].” [Id.](#) The following week, the
 23 defendant told the plaintiff “that the fixtures/furniture were removed from
 24 the [facility]” and that “an inspection would not be possible.” [Id.](#)

25 In finding that the defendant had committed spoliation of evidence,
 26 the district court concluded that the defendant “acted in at least a grossly
 27 negligent, irresponsible and cavalier manner” and held “that an adverse
 28 instruction may be appropriate.” [Id.](#) The court reserved its decision of the

1 language of the instruction until the plaintiff finished collecting evidence
2 from other facilities that were potentially similar to the facility at issue. *Id.*

3 Here, Walmart had an undeniable obligation to preserve and not
4 significantly alter physical evidence relating to its use and display of MMA
5 ELITE signs and nearby apparel. As in *Reed*, Walmart was put on notice by
6 UBM's Complaint that this evidence related to a crucial issue in the case.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] Just like in *Reed*, where the defendant permanently altered the
12 physical situation critical to the plaintiff's claims against it, Walmart's
13 actions in this case violated its obligation to preserve all such relevant
14 (indeed, critical) evidence. See *Reed*, 2016 WL 6805336, at *2.

15 **B. Walmart's Use of MMA ELITE Signs in the Marketplace**
16 **That It Created is Critically Relevant to This Case**

17 "Spoliation occurs when a party destroys evidence after receiving some
18 notice that the evidence was *potentially relevant* to litigation." *Columbia*
19 *Pictures*, 2007 WL 4877701, at *4 (emphasis added).

20 As alleged in UBM's Complaint, Walmart's use of MMA ELITE signs
21 and display of Walmart Apparel formed the very core of UBM's claims of
22 wrongdoing by Walmart. [See Docket No. 1 at ¶¶ 14, 16.]

23 A reasonable jury could find that the destroyed evidence supported
24 UBM's case. See *Star Envirotech*, 2015 WL 9093561, at *5 (evidence is
25 "relevant" to a claim if "a reasonable trier of fact could find that it would
26 support that claim"). If Walmart believed that its use of MMA ELITE signs
27 was innocent or helpful to its defense of UBM's claims, Walmart doubtless
28 would have taken photographs of that evidence to support its contention.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] From these facts alone, a reasonable
4 jury could conclude that the use of MMA ELITE signs would have supported
5 UBM's claims.

6 Moreover, UBM's pre-filing investigation revealed that Walmart stores
7 used MMA ELITE signs by displaying them in proximity to Walmart
8 Apparel. [[See Docket No. 1 at ¶¶ 14-16.](#)] A jury could reasonably conclude
9 that other Walmart stores displayed MMA ELITE signs and Walmart
10 Apparel in similar ways. *See Perez, 2014 WL 12591809, at *10* (it was
11 "reasonable to presume that other [deleted text] messages could contain
12 similar content" as the few text messages defendants had produced).

13 Walmart might argue that it did preserve evidence because it
14 maintained the signs themselves. This argument would have no merit. As
15 made clear in UBM's Complaint, and explained in [Reed](#), the relevant
16 evidence is the actual use of MMA ELITE signs and display of apparel in
17 proximity to those signs at Walmart's stores. Stated otherwise, the signs
18 themselves, divorced from the marketplace in which they and nearby apparel
19 were displayed, are useless. Merely saving some of the signs is "ineffective
20 and insufficient to satisfy [Walmart's] duty to preserve" the critical evidence
21 of its use of MMA ELITE signs in its stores. [Perez, 2014 WL 12591809, at *5.](#)

22 Walmart also might argue that the destroyed evidence would not have
23 revealed anything helpful to UBM, because Walmart's sales of Walmart
24 Apparel in 2016 and 2017 were not significant. That fact would not relieve
25 Walmart of its preservation obligation. Whether destroyed evidence
26 supports a party's position "is immaterial for purposes of imposing
27 sanctions; what is important is that the destroyed evidence was relevant to
28 the underlying dispute." [Id. at *7.](#) Here, it is indisputable that the evidence

1 Walmart destroyed was relevant. And, because Walmart destroyed that
2 evidence, UBM has been prevented from discovering whether or not
3 Walmart did, in fact, display Walmart Apparel near the signs.

4 **C. Walmart Willfully Destroyed Relevant Evidence**

5 **1. Walmart's Actions Constitute Willful Spoliation**

6 "A court need not find that a party acted in 'bad faith' in order to
7 impose sanctions for spoliation of evidence." [Perez, 2014 WL 12591809, at](#)
8 [*3](#). Rather, "willfulness or fault can suffice." [Garcia v. City of Santa Clara,](#)
9 [No. 10-cv-02424-SI, 2017 WL 1398263, *2 \(N.D. Cal. Apr. 19, 2017\)](#). "A
10 party's destruction of evidence qualifies as willful spoliation if the party has
11 'some notice that the documents were *potentially* relevant to the litigation
12 before they were destroyed.'" [Leon, 464 F.3d at 958](#) (citation omitted; italics
13 in original). Alternatively, a finding of "disobedient conduct not shown to be
14 outside the party's control is by itself sufficient to establish willfulness, bad
15 faith, or fault." [Sanchez v. Rodriguez, 298 F.R.D. 460, 463 \(C.D. Cal. 2014\)](#).

16 Under any of these standards, Walmart's behavior warrants sanctions.

17 Walmart acted with willfulness, if not bad faith, in [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 [REDACTED] [See, e.g., Ex. 7.] This fact further demonstrates
25 Walmart's willingness to preserve evidence it believes is helpful while
26 destroying evidence it thinks is harmful.

27 Walmart knew from UBM's Complaint that its use of MMA ELITE
28 signs was relevant to the litigation. Yet, eight months later, after realizing

1 the extent to which signs were still being used in its stores, Walmart
 2 destroyed that evidence without any notice to UBM. This level of willfulness
 3 is sufficient for the Court to impose sanctions. [Leon, 464 F.3d at 958](#)
 4 (spoliation “qualifies as willful” if the party knew the evidence was
 5 potentially relevant); [Garcia, 2017 WL 1398263, at *2](#) (“The court need only
 6 find that the offending party destroyed evidence with notice that the
 7 evidence was potentially relevant to the litigation.”).

8 In addition, all of the subject evidence was undeniably within
 9 Walmart’s control at the time Walmart destroyed it. Therefore, Walmart’s
 10 destruction of that evidence is “sufficient to establish willfulness, bad faith,
 11 or fault” for this reason as well. See [Sanchez, 298 F.R.D. at 463](#).

12 **2. Walmart Also Failed to Inform UBM That** [REDACTED]

13 [REDACTED]
 14 At a bare minimum, Walmart had a duty to alert UBM that [REDACTED]
 15 [REDACTED], and to provide UBM with
 16 “an adequate and meaningful opportunity to inspect” those stores. See
 17 [Aktas v. JMC Devel. Co., Inc., 877 F.Supp.2d 1, 13 \(N.D.N.Y. 2012\)](#). Courts
 18 have held that, even “[i]f a party cannot fulfill [its] duty to preserve because
 19 he does not own or control the evidence, he *still has an obligation to give the*
 20 *opposing party notice of access to the evidence or of the possible*
 21 *destruction of the evidence* if the party anticipates litigation involving that
 22 evidence.” [Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 \(4th Cir. 2001\)](#)
 23 (emphasis added); see also [First Sr. Fin. Grp. LLC v. Watchdog, No. 12-cv-](#)
 24 [1247, 2014 WL 1327584, *9 \(E.D. Pa. Apr. 3, 2014\)](#) (party has a “duty to
 25 preserve the evidence, or at least notify opposing counsel of any risk of
 26 destruction”). Notifying opposing counsel of the presence of evidence is a
 27 “minimally burdensome duty.” [Crown Battery Mfg. Co. v. Club Car, Inc.,](#)
 28 [185 F.Supp.3d 987, 998 \(N.D. Ohio 2016\)](#).

1 Logically, this obligation applies even more strongly where, as here, a
2 party *does* control the evidence prior to its destruction.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] Especially in light of Walmart's unequivocal denial of UBM's
7 allegation that Walmart still used MMA ELITE signs, [REDACTED]
8 [REDACTED] is indefensible.

9 Walmart likely will argue that it had no affirmative duty to "create"
10 evidence, such as photographs capturing Walmart's use of MMA ELITE
11 signs. Walmart would be wrong because UBM is not suggesting it had to
12 "create" any evidence. Rather, Walmart was obligated to *preserve* all
13 evidence relating to its use of MMA ELITE signs. It could have done so
14 either by taking photographs or by preventing the alteration of the physical
15 situation in its stores, analogous to the required suspension of routine
16 document destruction policies once litigation is reasonably anticipated. *See*
17 [Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 \(S.D.N.Y. 2003\)](#) ("Once
18 a party reasonably anticipates litigation, it must suspend its routine
19 document retention/destruction policy and put in place a 'litigation hold' to
20 ensure the preservation of relevant documents."). Walmart did not pursue
21 either option (or any other preservation option), thereby violating its
22 preservation obligation and destroying this critical evidence.

23 Walmart's argument also would not cure Walmart's failure to notify
24 UBM that MMA ELITE signs were still in the stores after the date of the
25 Complaint. [Silvestri, 271 F.3d at 591](#); [Watchdog, 2014 WL 1327584, at *9](#).

3. Walmart's History of Spoliation In Other Cases Confirms That It Did Not Act Innocently Here

This is not the first case in which Walmart has committed spoliation. To the contrary, Walmart has exhibited a pattern of destroying or failing to preserve evidence critical to plaintiffs' claims against it. As a result, Walmart has been sanctioned for its spoliation by courts around the country for at least the past 20 years. *See, e.g., Stedeford v. Wal-Mart Stores, Inc., No. 2:14-cv-01429-JAD-PAL, 2016 WL 3462132, *6 (D. Nev. June 24, 2016)* (imposing evidentiary and adverse inference sanctions against Walmart for failing to preserve relevant physical and videotape evidence); *Abdulahi v. Wal-Mart Stores East, L.P., 76 F.Supp.3d 1393, 1398 (N.D. Ga. 2014)* (sanctioning Walmart for "bad faith" destruction of evidence at heart of employment discrimination dispute); *Patton v. Wal-Mart Stores, Inc., No. 2:12-cv-02142-GMN-VCF, 2013 WL 6158467, *9 (D. Nev. Nov. 20, 2013)* (sanctioning Walmart for "reckless[ly]" destroying relevant evidence); *Woodard v. Wal-Mart Stores East, LP, 801 F.Supp.2d 1363, 1375 (M.D. Ga. 2011)* (imposing adverse inference instruction based on Walmart's loss of relevant video); *Britton v. Wal-Mart Stores East, L.P., No. 4:11cv32-RH/WCS, 2011 WL 3236189, *13 (N.D. Fla. June 8, 2011)* (finding bad faith when Walmart "intentionally let the inside video evidence be destroyed over time"); *Gaffield v. Wal-Mart Stores East, LP, 616 F.Supp.2d 329, 339-40 (N.D.N.Y. 2009)* (imposing monetary sanctions on Walmart for discarding bicycle relevant to lawsuit); *McDonald v. Wal-Mart Stores East, LP, No. 3:07cv425, 2008 WL 153783, *6 (E.D. Va. Jan. 14, 2008)* (imposing adverse inference for Walmart's destruction of physical evidence under its control); *Wilson v. Wal-Mart Stores, Inc., 199 F.R.D. 207, 208 (S.D. Tex. 2001)* (striking witnesses and experts and ordering adverse inference instruction against Walmart for "patently duplicitous behavior" in discovery); *GTFM,*

1 [*Inc. v. Wal-Mart Stores, Inc.*, No. 98 CIV. 7724 RPP, 2000 WL 335558, *3](#)
 2 [*\(S.D.N.Y. Mar. 30, 2000\)*](#) (sanctioning Walmart and noting that its “track
 3 record on compliance with discovery requests has been poor both in this case
 4 and in other cases”); [*Empire, Inc. v. Wal-Mart Stores, Inc.*, 188 F.R.D. 478,](#)
 5 [*481-82 \(E.D. Ky. 1999\)*](#) (discussing seven cases from 1996-1999 sanctioning
 6 Walmart for discovery abuses); [*Greenwalt v. Wal-Mart Stores, Inc.*, 253](#)
 7 [*Neb. 32, 41-42, 567 N.W.2d 560 \(Neb. 1997\)*](#) (affirming trial court’s striking
 8 of Walmart’s answer for refusing to produce documents ordered by court).

9 These cases dispel any notion that Walmart acted innocently in this
 10 case. Rather, Walmart’s history of destroying evidence further confirms that
 11 Walmart acted in bad faith here. As explained below, evidentiary and
 12 adverse inference sanctions are necessary to remediate the prejudice
 13 Walmart’s willful spoliation has created.

14 **D. Walmart’s Spoliation Severely Prejudices UBM**

15 Walmart’s willful spoliation of evidence has severely prejudiced UBM’s
 16 ability to prosecute its claims.

17 [REDACTED]
 18 [REDACTED]
 19 Walmart has destroyed all of that evidence. Without sanctions, Walmart
 20 might try to argue to the Court or the jury that UBM cannot meet its burden
 21 of proof, or that Walmart acted innocently in its use of MMA ELITE signs.
 22 Given that Walmart willfully destroyed evidence it knew was critical to
 23 UBM’s case, it would be unfair to let Walmart make such arguments.

24 In addition, trial will be approximately two months away from the date
 25 of the noticed hearing on this Motion. Thus, UBM’s ability to prepare for the
 26 upcoming trial has been severely prejudiced by Walmart’s willful spoliation.
 27 See [*Perez*, 2014 WL 12591809, at *7](#) (finding prejudice to moving party when
 28 trial was six months after hearing on spoliation motion).

1 In sum, Walmart failed to preserve – and, indeed, affirmatively
2 destroyed – critical evidence relating to UBM’s claims against it. For the
3 reasons discussed below, sanctions are necessary to level the playing field.

4
5 **V. EVIDENTIARY AND ADVERSE INFERENCE SANCTIONS**
6 **ARE NECESSARY TO LEVEL THE PLAYING FIELD**

7 **A. Evidentiary Sanctions are Necessary**

8 “Evidentiary sanctions may include introduction of evidence of
9 spoliation, preclusion sanctions, excluding evidence and witness testimony,
10 and taking matters deemed as admitted.” [Stedeford, 2016 WL 3462132 at](#)
11 [*6](#). Such sanctions are appropriate here.

12 [In Stedeford](#), for example, Walmart was sued over a slip-and-fall in
13 one of its stores. [Id. at *1](#). The plaintiff alleged she had “slipped on liquid
14 soap that had spilled on the floor in front of a self-checkout register.” [Id.](#)
15 “An incident report, claim notes, and witness statements were taken
16 immediately after the accident.” [Id.](#) Eight days after the accident, plaintiff’s
17 counsel sent Walmart a letter directing it to preserve relevant evidence. [Id.](#)

18 The evidence in the case included video surveillance of the accident
19 area, as well as the soap bottle that allegedly caused the spill. [Id. at *2](#).
20 Walmart, however, “*failed to preserve video surveillance evidence and*
21 *destroyed the soap bottle* after it was on notice of [plaintiff’s] reasonably
22 foreseeable claim.” [Id. at *9](#) (emphasis added). Because the video and soap
23 bottle were the most direct evidence of plaintiff’s claim, the district court
24 found that “any opportunity to explore the truth of the matter was destroyed
25 when Wal-Mart destroyed the evidence.” [Id. at *12](#).

26 As a result, the district court imposed evidentiary sanctions prohibiting
27 Walmart from arguing “an innocent explanation for the lack of video of the
28 incident” or contradicting its employees’ admissions that there was liquid on

1 the floor in the accident area “believed to come from a soap bottle found
2 nearby.” Id. at *13. The court also ordered an adverse inference instruction.

3 Similarly, in Perez, this Court granted evidentiary and adverse
4 inference sanctions where the defendant failed to preserve text messages
5 relating to a key issue in the case. See 2014 WL 12591809, at *5-10.

6 In this case, evidentiary sanctions are necessary for the same reasons
7 as in Stedeford. Here, as in Stedeford, Walmart was on notice that the
8 evidence it destroyed was relevant to claims against it at the time it
9 destroyed that evidence. Walmart should not be permitted to tell the jury
10 how it purportedly used MMA ELITE signs or displayed nearby apparel, or
11 argue to the jury that its use of MMA ELITE signs and apparel was innocent
12 or harmless, having destroyed the last remaining evidence of how its stores
13 actually used the signs and displayed Walmart Apparel.

14 Sanctions here are even more appropriate than they were in Perez. In
15 Perez, the defendant arguably was not put on notice of the importance of
16 text messages, yet still was sanctioned for failing to preserve those text
17 messages. Here, by contrast, Walmart was *specifically* put on notice by
18 UBM’s Complaint that the use of MMA ELITE signs and display of apparel in
19 Walmart’s stores was the critical issue in this case. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 Such evidence has been permanently destroyed and can never be recreated.

23 Walmart might argue that UBM should have conducted its own
24 investigation of Walmart’s 5,000 stores to determine where and how signs
25 were used. That argument would fail as a matter of law. Walmart’s
26 obligation to preserve evidence is its own, affirmative obligation. See
27 Napster, 462 F.Supp.2d at 1070 (“The obligation to retain discoverable
28 materials is an affirmative one”) (citation omitted). Walmart cannot relieve

1 itself of that affirmative obligation by trying to foist the burden onto UBM.
 2 See [Perez, 2014 WL 12591809, at *5](#) (“Shippers cannot foist its legal duty to
 3 preserve discoverable evidence on others by arguing that some of that
 4 evidence may be obtained from parties not involved in this action.”).

5 Moreover, UBM had no reasonable way of determining which of
 6 Walmart’s 5,000 U.S. stores still displayed MMA ELITE signs. And, as
 7 mentioned above, Walmart denied UBM’s allegations that Walmart was
 8 continuing to use MMA ELITE signs in its stores. [[See Docket No. 16 at p. 3](#)
 9 [\(denying Paragraph 16\).](#)] It would be nonsensical (and patently unfair) to
 10 require UBM to visit over 5,000 stores *after* filing its Complaint and *after*
 11 Walmart had denied that it still displayed any signs.

12 It also is irrelevant to Walmart’s preservation obligation that UBM had
 13 discovered that Walmart displayed signs in certain stores prior to filing its
 14 Complaint. See [Columbia Pictures, 2007 WL 4877701, at *2](#) (“The
 15 destruction of evidence clearly relevant ... cannot be justified by the
 16 assumption that it’s already been viewed by the plaintiffs.”)

17 Accordingly, UBM requests that the Court impose the following
 18 evidentiary sanctions to remediate the prejudice caused by Walmart:

19 1. Walmart’s use of MMA ELITE signs in 2016 and 2017 should be
 20 deemed to constitute willful infringement of UBM’s MMA ELITE trademark,
 21 and Walmart should be prevented from presenting any evidence, testimony,
 22 or argument that its use of MMA ELITE signs in 2016 and 2017 was not
 23 willful infringement of UBM’s MMA ELITE trademark; and

24 2. Walmart should be prevented from presenting evidence,
 25 testimony, or argument regarding when, where, or how it used or displayed
 26 MMA ELITE signs, or when, where, or how it used or displayed any non-
 27 licensed apparel similar in appearance and style to MMA ELITE branded
 28 apparel that was sold in its stores in 2016 and 2017.

1 **B. Adverse Inference Sanctions Also Are Necessary**

2 “[A] trial court also has the broad discretionary power to permit a jury
3 to draw an adverse inference from the destruction or spoliation against the
4 party or witness responsible for that behavior.” [Glover v. Bic Corp.](#), 6 F.3d
5 [1318, 1329 \(9th Cir. 1993\)](#). “[A] finding of ‘bad faith’ is not a prerequisite to
6 this corrective procedure.” *Id.* “Surely a finding of bad faith will suffice, but
7 so will simple notice of ‘potential relevance to the litigation.’” *Id.*; [Perez](#),
8 [2014 WL 12591809, at *9](#) (same); accord [Napster](#), 462 F.Supp.2d at 1078
9 (“Hummer’s conduct amounts to gross negligence, if not willfulness, which is
10 sufficient culpability to justify an adverse inference.”).

11 “[A] party seeking an adverse inference instruction based on the
12 destruction of evidence must establish (1) that the party having control over
13 the evidence had an obligation to preserve it at the time it was destroyed; (2)
14 that the records were destroyed with a culpable state of mind; and (3) that
15 the destroyed evidence was relevant to the party’s claim or defense such that
16 a reasonable trier of fact could find that it would support that claim or
17 defense.” [Napster](#), 462 F.Supp.2d at 1078 (citation omitted); see also [Perez](#),
18 [2014 WL 12591809, at *9](#) (same).

19 For the same reasons discussed above, adverse inference sanctions are
20 proper in this case.

21 Courts around the country have imposed adverse inference sanctions
22 on defendants who, like Walmart here, destroyed relevant physical evidence.

23 In [Reed](#), the court held “that an adverse instruction may be
24 appropriate” where, as here, the defendant irreparably altered physical
25 evidence critical to the plaintiff’s claims. [2016 WL 6805336, at *2](#).

26 In [Aktas](#), the plaintiffs sued for claims arising out of work performed
27 on their home. [877 F.Supp.2d at 5](#). After notifying the defendants of their
28 intent to file a claim, the plaintiffs destroyed portions of the work the

1 defendants had performed (e.g., by removing sheetrock that had been
2 installed) without notifying the defendants that they were doing so. [Id. at 14](#).
3 The court found that “plaintiffs knowingly destroyed evidence” and “were
4 grossly negligent and knowingly altered and destroyed defendants’ work.”
5 [Id. at 15](#). The court held that adverse inference instructions were
6 appropriate. [Id. at 21](#).

7 And in [Wagner v. Sea Esta Motel I, No. 13-81-RGA, 2014 WL 4247731](#)
8 [\(D. Del. Aug. 26, 2014\)](#), the plaintiff sued for injuries allegedly incurred
9 when a wooden railing he leaned on gave way and he fell three stories. [Id. at](#)
10 [*1](#). The defendant permitted the wooden railing – “the central piece of
11 evidence” in the case – to be lost by failing to pay the storage facility where
12 the railing was being stored. [Id. at *2](#). The district court ordered an adverse
13 inference instruction for this spoliation of evidence. [Id.](#)

14 Here, Walmart’s knowing and intentional spoliation was at least as
15 willful as the spoliation in these cases. Accordingly, UBM requests that the
16 Court give the following instructions (or any variations thereof that the
17 Court deems acceptable) to the jury at the time of trial:

18 1. “Walmart had a legal obligation to preserve all relevant evidence
19 after being served with the Complaint. Walmart violated this obligation by
20 intentionally destroying evidence that would have showed how Walmart was
21 using MMA ELITE signs in its stores to sell similar looking non-MMA ELITE
22 apparel. You may infer from Walmart’s destruction of this evidence that
23 Walmart intentionally used MMA ELITE signs to attract customers to
24 Walmart’s similar looking non-MMA ELITE apparel.”

25 2. “Walmart had a legal obligation to preserve all relevant evidence
26 after being served with the Complaint. Walmart violated this obligation by
27 intentionally destroying evidence that would have showed how Walmart was
28 using MMA ELITE signs in its store to sell similar looking non-MMA ELITE

1 apparel. You may infer from Walmart's conduct that the evidence destroyed
2 would have been favorable to UBM's case and harmful to Walmart's case."

3 **VI. CONCLUSION**

4 For the foregoing reasons, UBM respectfully requests that the Court
5 impose the evidentiary and adverse inference sanctions set forth in Part V.

6 DATED: July 5, 2017

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